RECENT DEVELOPMENTS

*Howsam v. Dean Witter Reynolds, Inc.**

I. INTRODUCTION

Parties to an arbitration agreement can rest assured (or be dismayed) that another aspect of "arbitrability" remains in the hands of an arbitrator and not the courts. In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court decided that issues of time-limit rules barring arbitrability are matters for the arbitrator to determine, not the judiciary.[1]

In disputes over arbitration clauses, a question often exists as to whether the arbitrator or the courts should decide matters. In *First Options v. Kaplan*, the Supreme Court held that the expressed intent of the parties determines who decides issues of arbitrability.[2] The decision by parties to submit to an arbitration agreement essentially means that they waive their right to the courts.[3] Thus, if the contract clearly expresses the intent of the parties to submit all questions to the arbitrator, the courts must defer to this judgment.[4] However, when such intent is unclear from the terms of the contract, courts are not required to grant such deference to the arbitrator.[5] Of special importance is the situation in which the parties have not clearly delineated who decides arbitrability issues, that is, whether or not the parties are able to arbitrate at all. Where there is no clear statement that an arbitrator should confront issues of arbitrability, this decision is left to the courts.[6] With its decision in *Howsam*, the Supreme Court sought to resolve the ambiguity surrounding the meaning of arbitrability and the balance of power between the courts and arbitrators.[7]

---

* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

[1] *Id.* at 81.

[2] First Options v. Kaplan, 514 U.S. 938, 943 (1995).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 862 (2003).

II. FACTS AND PROCEDURAL HISTORY

Karen Howsam claimed that Dean Witter Reynolds, Inc. ("Dean Witter") advised her to purchase interests in four limited partnerships.[8] Howsam determined this advice was flawed and moved to challenge Dean Witter for misrepresenting the value of the investments.[9] Under the contract between Howsam and Dean Witter, all controversies had to be submitted to arbitration.[10] Howsam, as the client, selected the National Association of Securities Dealers (NASD) as the arbitration body.[11] Howsam agreed to the NASD's Uniform Submission Agreement, which stated that the matter must proceed in accordance with the NASD's "Code of Arbitration Procedure."[12] Included in the Code was a clause providing that no issue may be brought before the NASD "where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute."[13]

After Howsam signed the Uniform Submission Agreement, Dean Witter filed suit in the United States District Court for the District of Colorado.[14] Dean Witter asked the court to deny Howsam the opportunity to arbitrate because the matter occurred more than six years previous.[15] The District Court determined that the arbitrator should decide whether the time limit had elapsed, not the court.[16] Dean Witter appealed to the Court of Appeals for the Tenth Circuit.[17] The Tenth Circuit reversed, stating that the NASD rule involved a question of "arbitrability" which is a matter to be decided by a court, not the arbitrator.[18] Howsam appealed the decision to the Supreme Court.[19] Because the Courts of Appeals were split on the question, the Court granted certiorari to decide whether the court or the arbitrator should determine the application of this NASD rule.[20]

---

[8] *Howsam*, 537 U.S. at 81.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 82.

[12] *Id.*

[13] *Howsam*, 537 U.S. at 82 (citing NASD Code § 10304).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956, 958 (2001).

[19] *Howsam*, 537 U.S. at 81.

[20] *Id.* at 83.

III. THE COURT'S DECISION AND REASONING

The Supreme Court held that arbitrators, not the courts, should apply the NASD time limit provision.[21] Thus, the Court settled the dispute among the Courts of Appeals as to who decides this rule.[22]

The Court reached this decision by determining that the NASD time limit rule did not constitute a "question of arbitrability," which would make it a matter to be determined by the courts.[23] This decision followed the Court's view that parties who agree to arbitrate generally agree that decisions will be made by the arbitrator, not the courts.[24]

A. *Defining a Question of Arbitrability*

Although the Court states that courts typically favor the use of arbitration, there are certain instances when an arbitration clause may be abrogated due to problems with its terms.[25] The scope of arbitrability is limited to situations in which the parties "would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so."[26] To force such parties to take "gateway" issues to an arbitrator would mean forcing the parties to arbitrate when they may not have contractually agreed to do so.[27] The Court has previously addressed questions of arbitrability relating to whether or not the arbitration contract binds parties who were not signatories to the agreement,[28] whether arbitration clauses survive corporate mergers,[29] and whether arbitration clauses in contracts apply in particular types of controversies.[30]

---

[21] *Id.*

[22] *See id.*

[23] *Id.* at 85.

[24] *Howsam*, 537 U.S. at 85.

[25] *Id.* at 83.

[26] *Id.*

[27] *Id.*

[28] *Id.* (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); First Options v. Kaplan, 514 U.S. 938, 942–943 (1995)).

[29] *Howsam*, 537 U.S. at 84 (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546–547 (1964)).

[30] *Id.* (citing AT&T Tech., Inc. v. Communications Workers, 475 U.S. 643, 651–652 (1986); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241–243 (1962)).

B. *Arbitrability Versus Questions of Procedure*

Questions of arbitrability are the types of questions that determine whether or not the parties actually agreed to arbitrate and whether the parties in question are bound to do so.[31] Questions of procedure, however, are for the arbitrator to decide.[32] The Court has determined that questions regarding "waiver, delay, or a like defense to arbitrability" are procedural.[33] The Revised Uniform Arbitration Act (RUAA) further states that the "arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled . . . such as *time limits*, notice, laches, estoppel, and other conditions precedent."[34]

C. *Labeling the NASD Rule*

The Court determined that the NASD time limit rule more closely resembles a question of procedure than a question of arbitrability.[35] Using the "waiver, delay, or like defense" notion found in *Moses Cone*, combined with the comments to the RUAA, the Court held that the rule should be applied and interpreted by the arbitrator.[36] In addition to its similarity with procedural questions approved previously by the Court, the NASD rule is better applied by expert arbitrators working under the NASD system as opposed to judges.[37] Unless something in the contract expressly states otherwise, the Court stated it is "reasonable to infer that the parties intended the agreement to reflect" the understanding that arbitrators will interpret and apply rules governing arbitration.[38]

To further bolster the view that the parties intended to be bound by the NASD rules as applied by NASD arbitrators, the Court points to NASD Code section 10324 which states that "arbitrators shall be empowered to interpret and determine the applicability of all provisions under this [NASD] Code."[39] By executing the Uniform Submission Agreement, Howsam and Dean Witter

---

[31] *Id.* at 83.

[32] *Id.* at 84.

[33] *Id.* (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

[34] *Howsam*, 537 U.S. at 85 (emphasis added) (citing REV. UNIF. ARB. ACT § 6, comment 2, 7 U.L.A. 12–13 (Supp. 2000))

[35] *Id.* at 85.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Howsam*, 537 U.S. at 86 (citing NASD Code § 10324).

"effectively incorporated the NASD Code into [their] agreement."[40] Therefore, the parties intended to be bound by the NASD Code in its entirety.[41]

IV. THE EFFECT OF THE *HOWSAM* DECISION

The *Howsam* decision set out to clarify the boundaries of several of the Court's past decisions regarding contract interpretation in the area of arbitration clauses. Whether the decision effectively accomplishes this goal is somewhat unclear. First, the definitions of "substantive arbitrability" and "procedural arbitrability" are still left somewhat vague. Second, the decision furthers the presumption in favor of arbitration without addressing the problems of inadequate legal training in the ADR field and the growing complexity of arbitration in corporate America. Finally, the Court entirely ignores the issue of waiver of judicial access, thus leaving this area of law open to debate.

A. *The* Howsam *Rule—Defining Arbitrability*

In its previous *First Options* decision, the Court left open the definition of "arbitrability" as it pertains to questions of procedure.[42] The lower courts had split as to how to characterize the time-limit rule.[43] Five circuits had determined that the time-limit rule presented a question of eligibility for arbitration, and thus, should be decided by the courts.[44] Five circuits determined that the rule was more like a statute of limitations, thus a procedural question.[45] *First Options* could be read to include questions of procedure under the larger banner of "arbitrability," thus creating a system where all questions go before the courts.[46] *Howsam* served to end this debate by declaring that questions of procedure did not relate to arbitrability, and thus, did not fall into the *First Options* analysis.[47]

---

[40] *Id.*

[41] *Id.*

[42] Reuben, *supra* note 7, at 864.

[43] *Id.* at 863.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 865.

[47] *Id.*

The Court held that unless parties expressly claim otherwise, questions of arbitrability are to be decided by the court.[48] The Court then attempts to define "questions of arbitrability" by stating that "procedural questions" are not subject to judicial determination because they do not determine whether the parties are "bound by a given arbitration clause,"[49] rather, they "grow out of the dispute and bear on its final disposition."[50] Part of the determination as to whether a question is procedural in nature is the notion that the parties would have expected the issue to be resolved by the arbitrator, not the courts.[51] Thus, the Court clearly preserves the idea of procedural arbitrability as opposed to substantive arbitrability, but only vaguely defines the boundaries of each.[52]

The Court determined that a time limit is a type of condition precedent to arbitrability, thus, a matter for the arbitrator to decide.[53] For this much of the *Howsam* analysis, the Court is clearly correct. However, the other factor in determining procedural versus substantive questions looks to the parties' intent.[54] In the case of Karen Howsam and Dean Witter, it is unclear that the parties were even aware of the time limit issue at the time they contracted, much less whether they would have assumed an arbitrator would decide the issue. The legal wrangling between these parties went through several stages, and the time limit policy adopted by NASD was not part of the original agreement. Strictly speaking, the NASD provisions were adopted into the original agreement, thus making them part of the contract between Howsam and Dean Witter. However, whether the parties would have agreed to the time limit term had they been aware of it at the time of the original agreement is uncertain. Thus, their intent and motivation are unclear.

B. *Presumptions in Favor of Arbitrability*

Perhaps the rule announced in *Howsam* would be more easily linked to the facts of the case had the contract between the parties been more straightforward, that is, outlining arbitration policies rather than merely referencing trade policies. Law schools today infrequently teach ADR

---

[48] *Howsam*, 537 U.S. at 83 (citing *AT&T*, 475 U.S. at 649).

[49] *Id.* at 84.

[50] *Id.* (citing *John Wiley*, 376 U.S. at 557).

[51] *Id.* at 83.

[52] Reuben, *supra* note 7, at 965. "One may reasonably question whether the Court's new nomenclature will engender more confusion than clarification . . . [b]ut it settles the law to know both that the procedural arbitrability doctrine is still viable, and perhaps more important, how it is to be treated analytically in the post-*First Options* regime." *Id.*

[53] *Howsam*, 537 U.S. at 85.

[54] *Id.* at 83.

techniques in contracts courses.[55] This leads to the question: should the courts place so much trust in the ability of attorneys to draft contracts when the attorneys have little or no knowledge of the ADR procedures?

An argument is made that the reason courts almost unilaterally enforce arbitration agreements is to decrease the court's docket by forcing cases into non-judicial processes.[56] However, modern arbitrations can often involve millions of dollars and affect the fates of large corporations as well as individual investors.[57] Given the fact that the parties' intent matters when courts interpret arbitration clauses,[58] combined with many attorneys' lack of ADR experience and the large amounts of money that may be involved, it is valid to argue that the Court should increase its oversight of contract interpretation in the ADR field, as opposed to granting presumptions in favor of ADR.[59]

Despite the argument that the courts bend over backwards to accommodate arbitration clauses, the argument also exists that *Howsam* served to cement the specific role of the courts in determining whether parties must arbitrate.[60] The majority opinion in *Howsam* attempted to set a clear boundary as to what types of questions the courts will decide in order to prevent future litigation of this type of matter.[61] However, this bright line test is undermined by later language that seems to promote the idea that the more expert decisionmaker should decide issues, rather than delineating the issues into procedural or substantive matters.[62] The two sections can be resolved. The dispute in *Howsam* did not center on whether the parties had agreed to arbitrate, rather, it only involved whether Howsam was able to bring a claim

---

[55] Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEGOT. L. REV. 271, 274 (2003). Offenkrantz cites to Professor Stephen K. Huber's observation that "law students received little, if any, exposure to arbitration during their legal education." *Id.* (citing Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDHAM URB. L.J. 915, 919 (2001)).

[56] Offenkrantz, *supra* note 55, at 272.

[57] *Id.* at 273.

[58] *Howsam*, 537 U.S. at 83.

[59] Offenkrantz, *supra* note 55, at 275.

[60] Reuben, *supra* note 7, at 863–64.

[61] *Id.* at 864. "Breyer articulated a relatively specific definition of 'questions of arbitrability' that would be subject to what he called 'the interpretive rule of *First Options*' . . . Breyer also took care to delineate the questions that do not fall within this 'more limited scope' of arbitrability." *Id.*

[62] *Id.*

at all.[63] Thus, the issue was the scope of arbitrability, not arbitrability itself.[64] Questions of scope receive a presumption in favor of arbitrability.[65] Here, the presumption in favor of arbitration dodges the harm that is posed in cases where arbitrability is at issue—when the parties have already agreed that arbitration is the method to resolve their dispute, there can be no issue of an arbitrator or a court forcing the parties to do something they do not want to do.[66]

C. *Waiver to Judicial Access*

An issue conditionally raised in *First Options* was ignored by the Court in *Howsam*. The Court did not address the issue of waiver.[67] *First Options* stated that waiver of judicial access must be "clear and unmistakable" but failed to state just what expressions would meet that standard.[68] The Court did not address Howsam's argument that this standard was met by a broad arbitration clause, or, in the alternative, by the broad arbitration clause combined with documents "that incorporate the arbitration of arbitrability issues into the arbitration provision by reference."[69]

1. *Waiver Through a Broad Arbitration Clause*

In both *First Options* and *Howsam*, the parties had blanket arbitration clauses, generally stating that "all disputes arising under the contract" are subject to arbitration.[70] Howsam argued that this clause provided "clear and

---

[63] *Id.* at 866.

[64] *Id.*

[65] *Id.*

> [T]he only disagreement was over who was to decide the 'eligibility' issue in this particular dispute . . . such scope issues receive a presumption in favor of arbitrability—a presumption in this case fortified by a recognition of the unique institutional competence of NASD arbitrators to resolve questions over the meaning of NASD rules.

Id.

[66] *Id.* Justice Breyer's opinion states that the type of questions to be decided by courts are those in which the parties would have expected judicial intervention, "where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 83–84.

[67] Reuben, *supra* note 7, at 866.

[68] *Id.*

[69] *Id.* (citing Petitioner's Brief at 32–37, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (No. 01-800)).

[70] *Id.* at 867.

unmistakable" intent to waive the right to judicial determinations of arbitrability questions.[71] In *First Options*, the Court did not expressly state that such clauses met or failed to meet the "clear and unmistakable" standard, but implied that blanket arbitration clauses would be unlikely to clearly waive judicial access.[72] The failure of the Court to ignore this argument in two cases should likely be read to mean that the argument is invalid.[73]

2. *Waiver by Incorporation*

In *Howsam*, the parties submitted to a broad arbitration clause. However, since the Court would likely refuse to recognize this clause as evidence of the parties' intent to waive the right to judicial access, Howsam further submitted that the clause, read in conjunction with the incorporation of the NASD rules, should constitute "clear and unmistakable" intent to waive access.[74] Since NASD Rule 10304 stated that arbitrators shall interpret the NASD Code, this presumption was incorporated by reference into the original agreement, bolstering the notion that the parties had waived the right to judicial determinations of arbitrability.[75] The Court did not address this claim to waiver. However, if the Court had adopted such a standard for meeting the waiver requirement, this would undermine the policy that parties should not be forced to arbitrate a matter that they never intended to arbitrate.[76] The failure to address these issues of waiver appear to support the idea that "clear and unmistakable" means just that—"an express and explicit waiver of court access rights."[77]

---

[71] *Id.*

[72] *Id.* Read together with *Howsam*, the Court's failure in *First Options* to recognize that a broad arbitration clause would meet the waiver standard would lead to the understanding that such a clause does not constitute waiver. *Id.* at 867–68.

[73] *Id.* at 868.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 867, 869. With regards to waiver by incorporation, Reuben states, "an incorporated expression of intent is one step removed from the arbitration provision itself, mere boilerplate referenced by more boilerplate. While such a procedure would clearly be more efficient . . . *First Options* was quite clear in rejecting efficiency rationales in favor of what appears to be a more specific case-by-case analysis." *Id.* at 869.

V. CONCLUSION

While the Court's holding provides a more solid understanding of the difference between substantive and procedural arbitrability questions, several issues are left open. First, the general presumption in favor of arbitration may require reexamination in light of education and complexity issues. Second, the failure of the Court to address the issue of waiver may force the Court to revisit cases substantially similar to *First Options* and *Howsam* to decide that issue. The *Howsam* decision, however, will provide some guidance to practitioners, arbitrators, and courts when they attempt to interpret and apply ADR contract provisions.

Megan E. Byrnett